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THE LAW OF STRIKES AND BOYCOTTS.

The decisions of the last few years in cases relating to strikes and boycotts, and the rights of parties to industrial disputes in the use of those weapons, show no approach to uniformity of judicial opinion. In *Allen* v. *Flood* (1898), A. C. 1, the officers, or an officer, of a trade union in the ship-building trade procured the discharge of certain workmen, members of another union, who were obnoxious to the former union because they worked in iron as well as wood and were considered as trespassing on the domain of the former union, although at the time not working on iron, by threatening the employer with a strike unless the obnoxious men were discharged. The discharged men sued the officer who had been thus instrumental in getting them discharged for damages, and the action failed by a majority vote of the Lords, contrary to the opinion of a majority of the common law judges, who were (by an ancient practice, seldom resorted to) summoned to attend and deliver opinions.

In *Quinn* v. *Leathem* (1901), A. C. 495, a trade union in the meat business boycotted a dealer who employed non-union

men and refused to discharge them, and induced one of his customers to stop buying of him by threatening to bring on a strike among the customer's workmen. The Lords, by a unanimous vote, sustained an action for damages brought by the dealer against the officers of the union.

Without going into the details of these cases it will be noticed that both were cases where a trade union used its peculiar powers to compel the discharge of non-union, or other union, men; the employer yielding in the one case, the men suffered; the employer resisting in the other case, he himself suffered. The injured men in the one case failed to obtain redress, while the injured employer in the other case succeeded.

In Massachusetts, in a case arising after *Allen* v. *Flood* and before *Quinn* v. *Leathem*, the Supreme Court refused to follow *Allen* v. *Flood*, and, following the trend of some earlier decisions in that state, held an attempt of one trade union to procure the discharge of members of another trade union by threats of strike and other conduct to be illegal and granted an injunction at the suit of members of the latter against members of the former, Holmes, C. J., dissenting.[1]

The New York Court of Appeals in a more recent case of the same general character, decided in 1902,[2] reached the opposite result by a vote of 4 to 3, and a suit for injunction and damages by the member of one trade union against the members of another failed.

The general doctrine about which all the cases revolve, as set forth, for example, in the leading case of *Walker* v. *Cronin*,[3] is that one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit, and that, while he has no right to be protected against competition, he has a right to be protected not only against infringement of definite property rights, but against malicious and wanton molestation or interference in his business, depriving him of opportunities for gain. That case decided

[1] *Plant* v. *Woods*, 176 Mass. 492.
[2] *Nat. Protective Assoc. of Steam Fitters, etc.*, v. *Cumming*, 170 N. Y. 315.
[3] 107 Mass. 555.

only an abstract principle, making no application of the principle, as it arose on a demurrer to a declaration alleging merely in general terms that the defendant did unlawfully and without justifiable cause molest, obstruct, and hinder the plaintiffs from carrying on their business, and, with the unlawful purpose of preventing the plaintiffs from carrying on their business, persuaded, etc., the servants of the plaintiffs to leave their employment, whereby the plaintiffs were put to expense, etc., and not disclosing what the relation of the defendants to the business was. The Court had no occasion, it is said in the opinion, to consider what would constitute justifiable cause.

It is evident that the molestation in question may be of various kinds according to the business relations of the person molested. An employer may be molested by inducing workmen to leave his employ or not to enter it; workmen may be molested by inducing the employer to discharge, or not to employ, them; a dealer may be molested by inducing customers not to buy of him, or other dealers not to buy of or sell to him; a manufacturer, carrier, or dealer may be molested by inducing other parties, or their servants, to refuse to handle, or work on, goods or materials coming from him.

It must be noted that the prohibition against interfering in another's business, by inducing third persons not to deal with him, does not prohibit such third persons from refusing to deal. It is lawful for the workman to strike; his right to do so is undoubted and unqualified, assuming, of course, that there is no contract for continued service. It is lawful for the employer to discharge his workman, for the customer to stop buying. What is prohibited is outside interference, inducing the workman, employer, or customer to do what he has a legal right to do, but perhaps would not do but for such intervention.

When we have, instead of a single person, a body of men exercising the right of refusing to deal, as in the case of striking workmen, the question at once arises whether the rule against inducing operates as between different members of that body. Each acting separately may strike, but may he induce others to join him? It seems that he may. That

workmen may act in concert and strike in a body by pre-arrangement is admitted universally at the present day.[4] We are aware of no modern case that in terms denies this right. One workman in such a case is not liable for inducing his fellow-workmen to strike.

Furthermore, there is this important qualification of the rule against interference—viz., it does not forbid "friendly advice or free expression of opinion." This is laid down in *Walker* v. *Cronin, supra,* and elsewhere, and applies most strongly in the case of a body of workmen working for a common employer.

Going a step farther, when men are associated together in labor unions, and strikes are conducted by the unions in the various ways provided by the constitutions of the unions, it is evident that the question of liability is further complicated. The union may embrace, as usually happens, workmen of different employers. It may be decided that the workmen of a particular employer, or of certain employers, or of all the employers, shall strike, and the strike may be voted, or ordered, by bodies which include others than the striking workmen, or by officers who are not themselves among the striking workmen. Are those not striking liable for inducing the others to strike, or, in case of a general strike, or strike in more than one shop, are those in one shop liable for inducing those in another shop to strike? In other words, does the rule in regard to a single body of workmen—*i.e.,* the workmen of a certain employer—extend to different bodies united in an association? If it does, they are protected, being treated as a unit or as entitled to advise each other. This question is at least partly answered in the affirmative by the authorities.

In *Wabash R. R. Co.* v. *Hannahan,* 121 Fed Rep. 563, decided last year, it was sought to enjoin the officers of the Brotherhood of Locomotive Engineers and the officers of the Brotherhood of Railroad Trainmen from ordering a strike, and it was held that the defendants could not be enjoined

[4] See Cooke on Trade and Labor Combinations, p. 34, collecting the cases.

against ordering the strike because it would in effect prevent the men from striking, which they had a right to do. So it is said by Taft, J., in another case in the U. S. Circuit Court,[5] after declaring the right of workmen to organize, and explaining the benefit thereof in enabling them to command better prices thus than when dealing singly with employers, and in other ways, "they have the right to appoint officers who shall advise them as to the course to be taken by them in their relations with their employer. They may unite with other unions. The officers they appoint, or any other person to whom they choose to listen, may advise them as to the proper course to be taken by them in regard to their employment, or, if they choose to repose such authority in any one, may order them, on pain of expulsion from their union, peaceably to leave the employ of their employer because any of the terms of their employment are unsatisfactory."

In a recent case, *Glamorgan Coal Co.* v. *So. Wales Miners' Federation* (1903), 1 K. B. 118, this doctrine was even applied to a case where compliance with the order to stop work involved a breach of contract on the part of the men, but the decision has been reversed on appeal, one of three judges dissenting.[6]

Although the right to strike, the right to stop work, which is merely one form of a refusal to deal, is almost universally stated to be absolute and unqualified, yet we find several cases in the Federal courts in which the question of motive is treated as material and as qualifying that right. In *Toledo, Ann Arbor and N. M. Ry. Co.* v. *Pa. Co.*, 54 Fed. Rep. 730 (1893), where there was a brotherhood strike of engineers on the plaintiff's road on account of the employment there of non-union engineers, and the engineers on the defendant's road were refusing to haul cars received from the plaintiff's road, an injunction was granted against the defendant company, or its employees (while continuing in the employment), refusing to receive and to deliver interstate freight from and to the plaintiff company. In the opinion by Taft, J., the in-

[5] *Thomas* v. *Cincinnati, New Orleans and Texas Pacific Ry. Co.*, 62 Fed. Rep. 803, 817 (1894).

[6] See Weekly Notes of Cases for August 15, 1903.

terstate commerce law is appealed to as requiring the free interchange of interstate freight between the two roads and as making an attempt to prevent it, or to induce others to refuse it, a criminal conspiracy. While refusing an injunction restraining the engineers from quitting the employment and saying that they can escape the injunction granted by so quitting, the Court considers fully the rights and liabilities involved, and concludes that the engineers may by quitting make themselves liable civilly in damages, and also criminally, although they cannot be enjoined from so doing, because you cannot compel by mandatory injunction the performance of personal service. "If they quit the service of the company in execution of rule 12 (a rule of the Brotherhood requiring engineers of one road to refuse to handle cars of a connecting road where there is a strike) in order to procure or compel defendant companies to injure the complainant company, they are doing an unlawful act, rendering themselves liable in damages to the complainant if any injury is thereby inflicted, and they may be incurring a criminal penalty."[7] And this, it is explained, applies as well to a single engineer as to a combination. Answering the argument on the other side, it is said, "But it is said that it cannot be unlawful for an employee either to threaten to quit, or actually to quit the service, when not in violation of his contract, because a man has the inalienable right to bestow his labor where he will, and to withhold his labor as he will. Generally speaking, this is true, but not absolutely. If he uses the benefit which his labor is, or will be, to another, by threatening to withhold it, or agreeing to bestow it, for the purpose of inducing, procuring, or compelling that other to commit an unlawful or criminal act, the withholding or bestowing of his labor for such purpose is itself an unlawful or criminal act. The same thing is true with regard to the exercise of the right of property. A man has the right to give or sell his property where he will, but if he give or sell it, or refuse to give or sell it, as a means of inducing or compelling another to commit an unlawful act, his giving or selling it, or refusal to do so, is itself unlawful."[8]

[7] Per Taft, J., 743.

[8] Per Taft, J., 738, 739.

In *Thomas* v. *Cinn., New Orleans and Texas Pacific Ry. Co., supra,* which arose from a boycott of the Pullman Palace Car Co., instituted by labor organizations, to carry out which strikes were instituted on various roads to force them to refuse to haul Pullman cars, it was held that one Phelan, a labor leader and associate of Debs, was in contempt for inciting strikes among the men. The opinion, which is by Taft, J., fully recognizes the right of combination and organization, as above shown, and seems to treat the defendant as on the same basis with the striking workmen, saying that his acts would be legal if the difficulty arose from dissatisfaction of the men with the terms of their employment. But it is pointed out that there was no such dissatisfaction, hence the illegality. "All the employees," it is said, "had the right to quit their employment, but they had no right to combine to quit in order thereby to compel their employer to withdraw from a mutually profitable relation with a third person, for the purpose of injuring that third person, when the relation thus sought to be broken had no effect on the character or reward of their service. It is the motive for quitting and the end sought thereby that make the injury inflicted unlawful, and the combination by which it is effected an unlawful conspiracy," etc.

In the so-called Northern Pacific Case[9] there was a strike among the employees of the Northern Pacific Railroad, then in the hands of a receiver appointed by the United States Circuit Court, on account of a general reduction of wages made by the receiver. The Circuit Court granted an injunction in very broad terms against the workmen, enjoining them not only from acts directly interfering with the receiver's possession of the property of the railroad, and attempts by force, intimidation, and threats to interfere with the employees of the road, or those seeking employment, but also against two further classes of acts—viz.:

(1) Combining and conspiring to quit the service, with or without notice, with the object and intent of crippling the property and embarrassing the operation of the railroad and

[9] *Arthur* v. *Oakes,* 63 Fed. Rep. 310 (1894).

(2) from so quitting the service, with or without notice, as to cripple the property or prevent or hinder the operation of the road.

On appeal to the Circuit Court of Appeals from this injunction, in which objection was made to the parts of the injunction here numbered 1 and 2, but not to that which preceded, it was held, Mr. Justice Harlan giving the opinion, that 2 should be struck out, but 1 should remain. It is said in the opinion that 2 should be struck out because you cannot have specific performance of a contract for personal service, and hence, even if the implied contract of railroad employees is not to quit without notice so as to embarrass the operation of the road, injunction is not available as a remedy. As to 1, the opinion asserts, in broad and emphatic terms, the right of the workmen to confer together and to strike in a body on account of the reduction of wages, without regard to its effect upon the property or operation of the road, adding that "their right as a body of employees affected by the proposed reduction of wages to demand given rates of compensation as a condition of their remaining in the service, was as absolute and perfect as was the right of the receivers to fix the rates they were willing to pay." But the opinion continues, "that is a very different matter from a combination and a conspiracy among employees, with the object and intent not simply of quitting the service of the receivers because of the reduction in wages, but of crippling the property in their hands and embarrassing the operation of the railroad," and proceeds at considerable length to support that idea by the discussion of the law of conspiracy.

These decisions naturally suggest the question so much discussed in *Allen* v. *Flood*—viz., whether malice may make an act illegal which is otherwise legal. Without entering upon a general discussion of that question, it should be noted that there is a difference between an act which is negative in character, which consists in not doing something, such as ceasing to work or refusing to deal, and one which is positive and consists in doing something. There is much less reason for holding motive or malice to be material in the former case than in the latter. Can motive then be material as affecting

the right to stop work or leave an employment? We should say plainly not. There is no more duty to continue in an employment, when the contract of service does not require it, than to enter the employment originally. There is no such duty in either case on the part of the workman, unless there is a corresponding right on the part of the employer to the services of the workman. To assert such right is simply to introduce slavery. If there is anything axiomatic in the law, therefore, it is the right to leave an employment for a good reason, a bad reason, or no reason. The contrary view appears to us most surprising, and we cannot think that it will ever gain currency.

If motive were material in case of refusing services as a laborer, there would be no reason for confining the doctrine to that class of cases; it would apply equally to other negative acts. Suppose, then, that a person, or several persons acting in conjunction with each other, refuse to make their customary contribution to the support of a clergymen, and he is obliged to resign in consequence, is it admissible to inquire into their motives for such refusal, and may they incur legal liability if their motives are adjudged not good? The question answers itself. It is also answered by an actual decision,[10] in the negative of course. In short, the doctrine asserted by the learned Federal judges seems to be purely socialistic.

Referring further to the cases in which it is announced, it seems that in the first of them,—viz., *Toledo, etc., R. R. Co.* v. *Pa. Co.*,—the interstate commerce act has no real bearing on the case. In the first place, the act of striking would not probably cause the railroad company to violate its obligations under the act, for the law would not hold the company in default for not handling freight when it could not get men to do the work. In the next place, even if this were otherwise, the interstate commerce law does not, any more than the common law, require men to continue in an employment in order to enable the employer to fulfil his obligations. As to the further idea advanced by the learned judge, that with-

[10] *Kearney* v. *Lloyd*, 26 L. R. Ir. 268 (1890).

holding one's labor or property may be unlawful in some cases, because it may operate to cause the person denied to commit an unlawful or criminal act, this is certainly a novel suggestion. Does he mean that, if I refuse alms to a beggar, who thereupon is driven by want to steal, I am liable civilly or criminally? There might be a great moral responsibility in such a supposed case, but, unless the law is to usurp the whole field of morals, no legal responsibility; which leads us to remark that the judges in the cases under discussion seem to have assumed the *rôle* of teachers of morals rather than of law, with results which might well be questioned, even on moral grounds.

In the opinion in *Thomas v. Cinn., N. and T. P. Ry. Co.,* the judge thinks inciting the strike illegal because there was no dissatisfaction among the men with the terms of their employment. This leads us to inquire as to what may be considered dissatisfaction. The men wanted the road to stop hauling Pullman cars. They may have had a good reason for asking that, or they may not have had. At all events, they demanded it as a condition of continuing in the employment, failed to get it, and hence struck. How can it be said that they were not dissatisfied with the terms of their employment?

The views expressed by Taft, J., in both of the above cases, in which he gave the opinion, might be considered as not necessary to the decisions respectively, although the matter was fully considered, but that cannot be said of the conclusions of Mr. Justice Harlan in *Arthur* v. *Oakes,* where the terms of the injunction depended on the doctrine announced. The rule of motive is here presented in a more extreme form than in either of the other cases, as the malicious motive was not supposed to be the sole motive. In this case, unlike the others, the men were dissatisfied with their wages, the strike arising from a reduction of wages. The idea of the learned judge seems to be, if we are able to comprehend it, that if the men acted from mixed motives, partly because dissatisfied with their wages but partly also from a desire to injure the road, their acts would be illegal, although otherwise legal. As the opinion does not deny the right to strike and to com-

bine for the purpose, and admits that there was sufficient cause if cause were needed, and that the injury to the road, which was inevitable, did not abridge their rights in that respect, the injunction granted seems to say, in effect, no more than this—viz., that the men must not, while exercising their right to strike, harbor any ill will against the company. The question which would be presented in case of an alleged violation of this injunction would evidently be one for a father confessor rather than for a legal tribunal, and even he would, we think, despair of reaching a conclusion of any value. The question presented as the controlling issue in the case is of no practical importance, and its consideration could only lead to refinements of casuistry. The law does not pursue shadows, and we cannot help regarding the decision as a vagary of legal learning. The opinion frankly admits that the case of the employer is parallel to that of the workman, as regards a breach of relations. May an employer, then, be liable for discharging a servant, without breach of contract, on account of his motives for discharging, and may he be enjoined from so doing? Statutes have recently been passed in some states forbidding an employer from discharging men for such reasons as that they belong to a labor union. These statutes are considered, and have been held to be, unconstitutional.[11]

It is noticeable that the feature of combination is emphasized by Mr. Justice Harlan, but that feature is eliminated in the opinion of Taft, J., in the Ann Arbor case. As the right of workmen to combine is so fully admitted, it is difficult to see how that feature can have any bearing.

Contrast with the above cases the opinion of Mr. Justice Brewer in the United States Circuit Court for Colorado.[12] There he punished for contempt certain strikers, who by demonstration of force and threats of violence, express or implied, overawed other workmen, but he took pains to explain fully, and to dwell upon, the absolute right of the workmen to strike peaceably and to induce their fellow-workmen to do

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[11] Stimson, "Handbook to Labor Law," 182. *State* v. *Julow*, 129 Mo. 163.

[12] *U. S.* v. *Kane*, 23 Fed. Rep. 748 (1885).

so. There is no hint that this right is affected by the question of motive; in passing upon the different individual cases, he does not consider whether any peaceable striker, either alone or in combination with others, was influenced by wrong motives. On the contrary, he says, referring to the reasons which certain men may have for striking, and may give in urging others to strike, "if the reasons are frivolous, that is their business, the employer has no right to object."

The right to refuse to deal involves the right to select the persons with whom one will deal, and to refuse to deal with certain persons or classes, and it excludes any inquiry into the reasons or motives of the actor or the justice of his selection. B has no claim that A shall employ him, or work for him, or buy of him, or sell to him, and consequently it is of no consequence why A refuses to do so. The reasons may be foolish or frivolous, they may involve what, in a popular and moral sense, appears to be unjust discrimination; but no legal liability flows therefrom, because there is no legal obligation which is violated. Personal dislike, ill-will, or malice will not create a cause of action in such case. An employer may choose to employ only Christians or Republicans or non-union workmen, and may discharge men already in his employ because they are Jews or Democrats or members of labor unions. That does not give the Jews or Democrats or union workmen any legal ground of complaint. Workmen may choose to work only in union shops, so called. No one would claim that the right to exercise such choice is subject to any restriction. A dealer may refuse to sell to, or buy of, any except members of a certain association.

Such refusals to deal may involve loss and injury to the persons refused, especially where relations previously formed are severed, as in case of the discharge of workmen by the employer, or strike by workmen, but that is not material.

Likewise the right to refuse to deal involves the right to name any terms which one pleases, and to refuse to deal except on those terms. The thing to be noted is that it does not matter how extravagant, absurd, or unreasonable the terms may be. If the person to whom they are offered

doesn't like them, he need not accept. The party offering is not bound to deal at all, and therefore may refuse to deal on any except specified terms. In cases where the terms offered are extravagant or in a popular sense unfair, the transaction is often stigmatized as extortion, coercion, and blackmail, but it should be noted that there is no extortion, coercion, or blackmail in a legal sense in such cases. A caution on this head is not out of place, as the use of such language is apt to mislead, the mind unconsciously allowing such expressions to take the place of argument. That this is not a needless caution is shown by the frequency with which the matter has been referred to in judicial opinions.

In *Jersey City Printing Co.* v. *Cassidy*[13] it is said, somewhat facetiously, that, as workmen have absolute freedom to combine, and to abstain from work, for good reasons, bad reasons, or no reasons, and may make any conditions they please, there is a wide field for the workman to dictate to the employer how he shall carry on his business.

To illustrate the above, A may refuse to sell to B at ordinary rates, or at all, unless B will agree not to retail below a certain price, or unless B will agree to buy only of A to the exclusion of other dealers. A is acting within his legal rights, although the latter condition, at least, may, under some circumstances, appear tyrannical.

Workmen may determine to leave their employment unless the employer will agree to conduct his business in a certain manner, or unless he will pay them a certain bonus; they may vote that he shall pay them such bonus and call it a fine, because he has done something that they don't like, violated some business rule which they conceive, rightly or wrongly, that he ought to observe, or which they want him to observe, and determine to leave unless the so-called fine is paid. Obviously there is nothing illegal in this. They are merely stating the terms on which they are willing to continue in the employment. They might refuse to continue in the employment as mere employees and insist on being

[13] 63 N. J. Eq. 759.

made partners or severing all relations. In this no one would say that they were not acting within their rights.

In *Carew* v. *Rutherford*,[14] a Massachusetts case much relied upon in a later case, the facts were as follows: The plaintiff, who was in the stone-cutting business, had in his employ twenty journeymen who were members of a local labor association, together with eight or ten unskilled laborers and four apprentices. The association, in consequence of the plaintiff sending certain work to New York to be done there, which they didn't like, voted that the plaintiff should pay to the association $500 as a penalty. On his refusal to pay, the journeymen left his shop in a body under the lead of two of their number, who had told him that all the association men in the shop would desert him at once unless he paid the $500. Afterwards the plaintiff paid the $500 to the defendants, and the men came back to work. The action was to recover back the $500 so paid, and the plaintiffs prevailed therein. The defendants were four of the journeymen, including the two just referred to, under whose lead the men left the shop. After the men had left and before the payment of the money, the defendants told the plaintiff that no association men would be allowed to work in his shop if he refused to pay the money. As the defendants here were themselves certain of the workmen who struck, there seems to have been nothing illegal in their conduct in reference to the strike itself, or in demanding $500 as a condition of remaining or returning to work. The only particular in which their conduct is open to attack is in saying that no association men would be allowed to work for the plaintiff if he refused to pay the $500. Possibly that might be construed as a threat to induce other members of the association not to enter plaintiff's employment, but that construction seems rather strained, and it seems more natural to regard it as merely a statement of the effect of the vote passed. Aside from this, the defendants did nothing but exercise their right to strike in conjunction with the other men, and to refuse to return except on certain terms. The opinion admits

[14] 106 Mass. 1 (1870).

the right of "any number of persons, without an unlawful object in view, to associate themselves together, and agree that they will not work for, or deal with, certain men or classes of men, or work under a certain price, or without certain conditions," and does not point out specifically what the defendants did more than this. The conduct of the defendants is characterized as "extortion," but, as above explained, it was not extortion in any proper sense of the term. It seems difficult to support the decision.

So, likewise, a manufacturer or dealer may refuse to sell to another dealer unless the latter will conduct his business in a certain manner. Dealers may associate together and agree on certain methods of conducting business, which they conceive to be desirable or necessary for the successful prosecution of their branch of business, and determine to deal with no dealer who departs from their rules. Those who do not choose to conform to requirements thus made cannot complain because the members refuse to sell to them or buy of them, and it doesn't matter whether the rules in question are good or bad. No question can be raised as to their fairness or unfairness. No one is obliged to sell to another, or to buy of him, any more than to work for him or employ him.

Cases of the above character have come before the courts in a number of instances.

In *Cote* v. *Murphy*[15] workmen in the building trade combined to get a reduction of hours and the dealers combined to resist, and agreed not to sell to any one who granted the men's demands. The plaintiff, a dealer not in the combine, having granted the men's demands, and not being able to get building material from those in the combine, sued the latter, claiming that they were liable for thus trying to compel him to conform to their practice. The decision was in favor of the defendant.

In Minnesota a similar case arose.[16] There an association of wholesale lumber dealers agreed not to sell directly to consumers at any points where a member of the association

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[15] 159 Pa. St. 420 (1894).

[16] *Bohn Mfg. Co.* v. *Hollis*, 54 Minn. 223 (1893).

had a yard, and not to sell to dealers who did otherwise. The plaintiff having violated this rule, the secretary of the association was about to notify the members in accordance with the by-law of the association, and demanded that the plaintiff should pay to the association a commission on the sales made by him in violation of the above rule, whereupon the plaintiff sued for an injunction and damages. It was held that the action would not lie. The Court in the opinion alludes to the danger of being "influenced by such terms of illusive meaning as 'monopolies,' 'trusts,' 'boycotts,' 'strikes,' and the like," saying that the facts of the case "involve no element of coercion or intimidation in the legal sense;" what one may lawfully do, many may combine to do, and the defendants have done no more.

In a Rhode Island case [17] an association of master-plumbers notified wholesale dealers in supplies not to sell to non-members on penalty of withdrawal of the patronage of the members of the association. In an action by a dealer against whom this notification was enforced it was held that he could not recover, the Court in a well-considered opinion saying, "The threats were not coercive in the legal sense; for though coercion may be exerted by the application of moral as well as physical force, the moral force exerted by the threat was a lawful exercise by the members of the association of their own rights, etc."

The term or condition annexed to an offer may relate to the offeree's relations to a third person, and that may raise a question whether such person has any ground of complaint. I will sell to you at reduced rates if you will stop buying of my competitor B, I will employ you if you will stop patronizing my enemy B. Has B a cause of action? Suggestive cases under this head have arisen in Maine,[18] Tennessee,[19] and Indiana.[20] In the Maine case the plaintiff owned a house, which he rented, on an island where the only possible tenants were the workmen of the defendant. The defendant,

[17] *Macauley* v. *Tierney*, 19 R. I. 255 (1895).
[18] *Heywood* v. *Tillson*, 75 Me. 225 (1883).
[19] *Payne* v. *R. R. Co.*, 13 Lea. 507 (1884).
[20] *Jackson* v. *Stanfield*, 137 Ind. 592 (1893).

being at enmity with the plaintiff, gave notice that he would not employ any man who should rent the house, and thereby prevented the plaintiff from getting a tenant. The Court said, in deciding for the defendant, that the fact that men are enemies will not give a cause of action; the defendant had a right to employ whom he chose, and "even the malicious exercise of this right would give the plaintiff no cause of action."

In the Tennessee case a railroad company, defendant, published notice that it would discharge any man who should trade with a certain merchant, the plaintiff. As in the Maine case, the Court decided in favor of the defendant, saying that one does not render one's self liable for maliciously exercising his rights, and announcing his intention of doing so. Two judges, however, dissented, and argued that whenever the exercise of a legal right is solely for the purpose of injury to another, and such injury follows, he should respond in damages.

In the Indiana case there was a rule of a retail dealers' association in the lumber trade against wholesalers selling to customers or brokers, and the rule was enforced against A, whereby B, a broker who bought of him, was injured in his business. It was held that B could recover against the members of the association. It will be noticed that the facts were very similar to the facts in *Bohn Mfg. Co.* v. *Hollis, supra,* except that the suit was by a third person instead of the one directly affected. The Indiana court considers, and disagrees with, the latter case, and characterizes the arrangement in question as "a compact to suppress the competition of those who did not own yards, with an adequate stock on hand, by driving them out of business. By this plan they reach the wholesale dealer and compel him to pay an arbitrary penalty under a threat of financial injury, and they force him to assist in ruining the dealer who does not own a yard."

In reference to the position here taken by the court, it seems to be the law that if a contract is in restraint of trade, the consequence is merely that it is not enforceable; it does not give any third person a cause of action. (Cooke on "Trade and Labor Combinations," p. 161.) And in a

recent Scotch case,[21] where an association of butchers told cattle salesmen that they would not buy at their sales if persons representing the Co-operative Society were allowed to bid, and the salesmen in consequence refused to receive bids from the Co-operative Society, it was held that the latter society could not maintain an action against the butchers.

It is evident from the discussion and citations so far that great injury may be inflicted by a refusal to deal, but no cause of action arises therefrom.

Having so far considered questions arising from refusals to deal, which may be sometimes complicated with questions of inducing not to deal, we now come more directly to the latter subject. We have already noted that molestation, or inducing not to deal, may be directed against any one in the various relations of life, employer, workman, dealer, etc. It may also spring from various motives, and various means may be adopted to accomplish it. It may arise from competition, a widely operative cause, and when it does there is no doubt that it is justified. A workman may try to get another man's job away from him; an employer may try to get a workman away from the employer he is working for; a tradesman may try to get another man's customers; and, if successful, incurs no liability to the person thus deprived of his job, his workman, or his customer. It may arise from some personal interest which the actor has other than competition, as in case of one fellow-workman objecting to another. It may arise from interest in the public welfare, as where one exposes a swindler, or hypocrite, or denounces an enterprise or business as immoral, or injurious to health or good manners. It may arise from more questionable motives, and, finally, from malice. The means used may be actual violence, as where striking workmen drive away other workmen, or threats of such violence, or other unlawful acts, or threats to do something which is lawful but which is injurious to the person threatened, such as a threat to strike,

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[21] *Scottish Co-op., etc., Soc.* v. *Glasgow Fleshers' Trade Defence Association*, 35 Scottish L. R. 645.

or a threat to discharge, or a threat to withdraw one's patronage; or the means may be ordinary persuasion, appeals to reason or prejudice.

We may agree at the outset that, if actual violence is the means used, liability follows. The old and much quoted cases where the defendant was held liable for driving away the plaintiff's customers by assaulting them,[22] and the somewhat similar case where defendant was held liable for frightening game away from the plaintiff's decoys,[23] are instances of this. A more modern instance is where striking workmen drive away other workmen. In practice a common case, and one which has given rise to much litigation, is where damages or injunction is sought for procuring the discharge of a workman. Generally the litigation arises from the activity of labor unions, but not always.

Thus, in a Vermont case,[24] the defendant, who employed A, who in turn employed B, being angry with B. required A to discharge B, on pain of being himself discharged if he did not do so; whereupon A discharged B. It was held that B had no cause of action against the defendant, although the defendant acted maliciously.

In an Illinois case[25] there was a decision supporting the right of action. In that case a workman brought suit against his employer to recover for personal injuries received. The Accident Liability Company, in which the employer was insured, procured the latter to discharge the man, apparently with the purpose of forcing the settlement of the suit on favorable terms, by threatening to cancel the employer's policy of insurance. It was held that the company was liable for so doing.

In each of these cases the defendant sustained, although indirectly, certain business relations to the plaintiff. In the Vermont case the defendant may be considered to have had an interest in the kind of men employed by A in his, the

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[22] *Tarleton* v. *McGawley*, 1 Peake 270 (1794).
[23] *Keeble* v. *Hickeringill*, 11 East 574, note (1706).
[24] *Raycroft* v. *Tainter*, 68 Vt. 219 (1896).
[25] *London Guarantee, etc., Co.* v. *Horn*, 101 Ill. App. 355.

defendant's, work. In the Illinois case the defendant company certainly had an interest in the kind of men whom the insured should employ, and might properly not wish to have a man employed who had once met with an accident and caused it loss thereby. The Vermont court apparently thought that such interest justified the request to discharge and precluded a consideration of other motives; but the Illinois court (not a court of last resort) thought differently.

If the cook, having had a quarrel with the butler, says to the master, "Discharge the butler or I will leave you," and the master discharges the butler, is that actionable? This very question was asked by way of illustration in the famous case of *Allen* v. *Flood, supra,* and fairly states the issue in the class of cases to which that case belongs. An unlearned man would find no difficulty, we surmise, in answering it. His answer would be in the negative. But it was answered in different ways by two at least of the different judges and lords giving opinions in that case, Cave, J., answering it in the affirmative and Lord Herschell in the negative.

There is one point of difference, however, between the case supposed and the ordinary case arising from the activity of labor unions. The cook is not a rival of the butler, and does not want his place, whereas, in a contest between union and non-union workmen or between members of rival unions, one set is seeking to supplant the other. In other words, the claim for damages is weaker in the cases usually arising for decision than in the case supposed. *Allen* v. *Flood,* however, should, perhaps, be excepted from this remark, as the obnoxious workmen were working in iron and not in wood at the time of the difficulty.

In the Massachusetts and New York cases referred to at the beginning of this article, in which the courts came to opposite conclusions, with dissents in each case, the New York court following the decision of the House of Lords in *Allen* v. *Flood* and the Massachusetts court refusing to follow it, the contest was in each case not between union and non-union workmen, but between rival labor organizations.

If union workmen threaten to strike unless non-union men, or members of a rival union, are discharged, is this

actionable? Can the latter, if discharged, thereafter recover damages, or, before discharge, have an injunction?

There are two independent reasons which may be urged in support of the negative. The first is that there is nothing unlawful in a threat to strike. The right to threaten to strike follows from the right to strike. Threats are often spoken of, as if all threats were alike and were on the same basis as threats of violence. Hence the use of the term is apt to be misleading, as we have already seen to be the case in the use of the word "coerce" and similar expressions. But a threat is only an announcement of intention, and, although usually used in reference to something injurious, it may refer to something which is lawful although injurious, and, as said by Lord Herschell in *Allen* v. *Flood, supra,* "The law cannot act differently because you choose to call it a threat or coercion instead of an intimation or warning." [26] One may threaten to do what he has a right to do. Since a workman may strike, he may announce his intention to do so. Such an announcement has no quality which makes it tortious. It is a neutral act. It merely conveys information, and it may be for the benefit of all concerned that the announcement should be made in advance, rather than that the workman should strike without notice. In fact, where notice of intention to leave is required by the contract, the unlawfulness would seem to be in omitting it rather than otherwise.

The conclusion seems unavoidable, therefore, that a mere threat to strike in a certain event does not give a cause of action, whatever the consequence. The ground on which it is claimed to do so is, that it is used as a means to induce the employer to discharge the obnoxious men. As to this, it should be said that, if the announcement or threat is not all, if, in addition to it or in connection with it, the employer is asked to discharge the men, or, if the announcement is not a true statement of intention, if, in fact, those threatening to strike do not intend to do so, but falsely represent that they

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[26] See also remarks of Holmes, J., in *Vegelahn* v. *Guntner,* 167 Mass. 92, 107.

do as a means of inducing the employer to discharge the men, then the facts make a case of inducing, but not otherwise. In practice a very slight difference in the facts, or different constructions or versions of the general facts, would make the difference between one case and the other. But the defendants are entitled in every case to have the difference recognized. In *Allen* v. *Flood* different judges put different constructions on the testimony as bearing on this distinction, some considering that the defendant tried to persuade the employer to discharge the plaintiffs, others considering that he did no more than state what would happen if the men remained and left it entirely to the employer to decide what course he would pursue without trying to influence him; and the different views of the evidence thus taken have been suggested as explaining the difference of opinion among the judges in that case.[27]

In *Plant* v. *Woods, supra,* which will presently be considered more fully, the Massachusetts court seems to have strained the facts to make a case of inducement. The defendants there appear not even to have made any threats expressly, but the court finds that threats should be implied from what they did. The nearest approach to a threat was that, when an employer asked if there would be trouble in a certain event, the defendant did not deny it.

In *Heywood* v. *Tillson, supra* (p. 88), and *Payne* v. *R. R. Co., supra* (p. 89), the Maine and Tennessee courts, in cases involving a refusal to deal on the part of the employer, recognized and acted on this distinction between mere threatening and inducing.

Speaking of inducement, an actual strike would naturally operate more strongly than a threat of strike to cause the employer to discharge the obnoxious men; but of course that would not be unlawful. It seems strange that the less effective method—viz., by threat—should be held illegal, when the more effective is not. Lord Herschell in *Allen* v. *Flood, supra,* refers to this point, saying that he cannot

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[27] See article in AM. LAW REG. for March, 1903, on "Some Leading English Cases on Trade and Labor Disputes," by W. D. Lewis.

understand how an action lies, because, instead of leaving, there was an intimation that they would do so.[28]

In the second place, supposing a case of inducing is made, that is, supposing the defendants ask to have the plaintiffs discharged, the defendants, if they are fellow-workmen with the plaintiffs or represent fellow-workmen, are acting within their rights, because they have an interest in who shall be their fellows; their safety, comfort, convenience, and personal pleasure are concerned. No one would deny that a workman, under some circumstances, would have a right to ask for the discharge of a fellow-workman. Then how is it to be determined when the proper circumstances exist? Who shall say what is a good and sufficient cause for such request? It may be a matter of taste merely. Evidently the courts would not try the sufficiency of the cause. Hence the law says that it will not inquire into the motives of the defendant. The relation of the parties renders the act justifiable without such inquiry, as in case of somewhat different relation in *Raycroft* v. *Tainter, supra.*

Referring now to the argument in support of the affirmative of the question under consideration, it is that a man has a right to pursue his calling unmolested, and the opinions on that side deal largely in pictures of the merciless manner in which the labor unions use their powers and the undeserved injury inflicted by them on innocent men, their methods being denounced as threats, coercion, compulsion, conspiracy, etc., the position of the employer being sometimes compared to that of a traveller, who, on a pistol being presented to his head by a highwayman, surrenders his purse; and it is said that their efforts to oust other workmen are made not to benefit themselves, but to injure the others.

These arguments do not go far towards answering the positions taken above in the negative of the question. The right to pursue one's calling unmolested is not a general, but a very limited, right. In the exercise by different persons of the same rights collisions inevitably ensue, and no one is entitled to be exempt absolutely from molestation. Compe-

[28] Per Herschell, L. J., *Allen* v. *Flood* (1898), A.C. 1, 130.

tition implies molestation. It is therefore incumbent on those arguing in support of the liability to answer more specifically the positions taken in the negative, and this apparently they fail to do. All the evils which they paint would apply equally well as an argument against the right to strike and the right to combine. The vituperative epithets so freely used in place of argument, when analyzed, are seen to amount to nothing. The compulsion exercised consists wholly in naming the terms on which alone the men are willing to give their services, and such naming has force only when the employer desires those services too strongly to refuse the terms. To characterize the conduct of the workman, therefore, as compulsion involves an implication, which, of course, is untrue, that the employer has a claim to the workman's services. The comparison of the position of the employer to that of a traveller stopped by a highwayman is certainly, as said by Lord Herschell in *Allen* v. *Flood,* "grotesque." [29]

The general charge of molestation and interference is a two-edged sword, which may logically be turned against them; to deny one the right to strike, to combine for the purpose, to announce his intention to strike, to choose one's associates, and to get another's job if possible, is itself an interference with the rights of the workman.

Commonwealth v. *Hunt,*[30] a Massachusetts case decided as early as 1842, in which Chief Justice Shaw gave a carefully written opinion, goes far to support the negative of the question under consideration, and may well be studied in connection with the recent case of *Plant* v. *Woods,* which is on the other side of the question. In *Commonwealth* v. *Hunt* the members of a club, or association, of boot-makers agreed not to work for any employer who should employ others than members of the club after notice to discharge them, or who should employ any one who should break any of their by-laws, unless he should pay the penalty imposed therefor. An indictment against the members for criminal

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[29] Per Herschell, L. J., *Allen* v. *Flood* (1898), A. C. 1, 130.
[30] 4 Met. 111.

conspiracy alleged this agreement and various acts done in pursuance of it—*e.g.*, that by means of such conspiracy the defendants compelled an employer, W, to discharge a workman, H, because H would not pay to the club a penalty for a breach of the by-laws; that defendants conspired to impoverish H and prevent him from following his trade and earning a livelihood, and did unlawfully prevent him from following his trade and did greatly impoverish him; that the defendants conspired to impoverish W and other employers and to hinder them from employing any who should not, after notice, become members of the club, or who should break any of the rules and not pay the penalty therefor.

After a verdict of guilty, a motion in arrest of judgment was sustained, Shaw, C. J., saying in substance: The manifest intent of the association is to induce all those engaged in the same occupation to become members of it; such a purpose is not unlawful; the means to be used were not to work for an employer who should continue to employ a non-member after notice; this is lawful; it is not criminal for men to agree to exercise their own acknowledged rights in such a manner as best to subserve their own interests. A fair test is to consider the effect of such an agreement where the object of the association is acknowledged to be a laudable one; *e.g.*, suppose workmen agree not to work in a shop where ardent spirits are used, or for an employer who, after notice, should employ a workman who used them; this might make it difficult for such a workman to get employment and might embarrass the employer, but it would be lawful. The manner in which W was "compelled" to discharge H—viz., by the defendants agreeing not to work for W—is not unlawful, there being no contract to work for a certain time which was violated; the word "compel" is disarmed and rendered harmless by the precise statement of the means by which such compulsion was to be effected. The allegations as to impoverishing, etc., show no unlawful acts; associations may be entered into, the object of which is to adopt measures that have a tendency to impoverish another, that is, to diminish his gains, and yet, so far from being unlawful, the object may be highly meritorious and public spirited—*e.g.*, where

a rival baker is introduced in a small village and the price of bread thus reduced.

This decision seems to us to be of the highest importance, and to contain an answer to all the arguments that are made in support of the claim of liability. Here we have a case of combination in its extreme form, it being agreed that the members will not work with non-members, and the attempt being to bring all those in the trade into the association. The methods employed are those which have been held by some to be illegal—viz., to notify the employer to discharge the obnoxious workmen; the workman is thereby driven out of his place and the employer harassed and both impoverished, and we have the allegation of a malicious intent to injure. Every element is contained in the case which has been claimed to make such conduct unlawful. Yet the court finds nothing unlawful in it all, nothing but the exercise of the defendants' ordinary civil rights.

Now let us compare with this the decision of the same court in *Plant* v. *Woods*. The facts in that case were as follows: A local union of painters in Springfield tried to induce former members, who had withdrawn and formed another union, to ask for reinstatement; and, with a view to compel them to do so, voted that they were non-union men and to notify their employers of that declaration; later voted to strike in shops where the others were employed, if their demands were not complied with, visited the employers and asked the latter to request the men to sign applications for reinstatement; when asked by some employers whether, if the men did not rejoin the union and were retained by the employers, it would mean loss or trouble in their business in the nature of strikes or a boycott, they did not deny that it might; they finally caused strikes to be instituted in some of the shops, and threatened, in the case of one employer, that his place of business would be left off from a so-called fair list published by the Central Union. The action was a suit by the members of the new union against the members of the old for an injunction. The master found that the defendants intended that the employers should fear trouble in their business "in the nature of strikes or a boycott" if they failed

to get the men to go back into the union and continued them in their employ; that they did so fear and had reason to do so. The court granted an injunction enjoining the defendants from (condensing the material part) interfering with the employment of the plaintiffs by representing expressly or impliedly to their employers that they are likely to suffer loss or trouble in their business for employing the plaintiffs, or by representing to persons giving contracts to said employers that they are likely to suffer loss or trouble for doing so; or by intimidating or attempting to intimidate any employer of plaintiffs by threats of loss or trouble in business; or by attempting by any scheme to interfere with or prevent any person from employing plaintiffs; and from all acts which will tend to impede plaintiffs from securing or continuing in employment by putting any person in fear of loss or trouble.

The ground on which the case goes, as presented in the able and vigorous opinion of Mr. Justice Hammond, is, in brief, that the defendants conspired to compel the plaintiffs to join the defendants' union, using threats of strikes and boycotts to induce the employers to discharge the plaintiffs unless the latter should join. The opinion describes in graphic language the havoc which the defendants might work, the ordeal which the employers in case of continued strikes might have to pass through, and the injury to the plaintiffs in that "if the defendants can lawfully perform the acts complained of in the City of Springfield, they can pursue the plaintiffs all over the state in the same manner and compel them to abandon their trade or bow to the behests of their pursuers."

The defendants in this case seem to have acted within their rights in any view of the law. There was no request to the employers to discharge them, no threat of a strike was volunteered; if anything was said about strike or boycott, it was in reply to a question asked by the employer, and the report does not show that any answer was given, merely "they did not deny," etc. What operated as the real inducement in the minds of the employers was not any persuasion used by the defendants, but the facts of the situation—viz., the fact that

they had struck in some instances and intended to strike in others if the men did not come back. It seems idle to infer from the otherwise colorless conduct of the defendants threats and persuasion, and base thereon a cause of action which would not otherwise exist. But if it is permissible to consider that the defendants notified the employers that they would strike if the obnoxious men were not discharged, the case seems opposed to *Commonwealth* v. *Hunt*. Nor does the opinion answer satisfactorily the contentions of the defendants. These contentions are stated very fairly by Hammond, J., as follows—viz., "That a person may work for whom he pleases; and, in the absence of any contract to the contrary, may cease to work when he pleases, and for any reason whatever, whether the same be good or bad; that he may give notice in advance, with or without stating the reason; that what one man may do several men acting in concert may do, and may agree beforehand that they will do, and may give notice of the agreement; and that all this may be lawfully done notwithstanding such concerted action may, by reason of the consequent interruption of the work, result in great loss to the employer and his other employees, and that such a result was intended." To this it is answered, "In a general sense, and without reference to exceptions arising out of conflicting public and private interests, all this may be true," but the opinion fails to enlighten us as to what those exceptions are, and thus abandons the argument at the vital point. In the citation of authorities the opinion relies largely on *Carew* v. *Rutherford, supra,* a case which we have already given reasons for doubting.

In *National, etc., Association of Steam Fitters, etc.,* v. *Cummings, supra,* the facts were very similar to the facts in *Plant* v. *Woods, supra;* there was, as in that case, a contest between rival labor organizations, and members of the defendant union threatened to cause a strike unless members of the plaintiff union were discharged, and threatened to prevent members of the plaintiff union from getting any work, except a certain limited class of small jobs, by ordering a general strike against the plaintiff union wherever its members were at work. The majority opinion by Parker, C. J.,

deciding in favor of the defendant, takes the ground that motive in such cases is not material, or, if material, still no cause of action is shown, and makes substantially the points above outlined, while the minority take the ground that the object of the defendants was not to get better terms for themselves, but to prevent others from following their lawful calling, and that their purpose and methods were unlawful.

The New Jersey case of *New Jersey Printing Co.* v. *Cassidy, supra,* fully recognizes and asserts the right of union workmen to threaten to strike unless non-union men are discharged.

Although the English and New York courts seem to support the rights of workmen to procure the discharge of other workmen, there are two cases in those jurisdictions respectively which are on the opposite side of the question, and which further hold that an agreement made in advance by the employer and the defendant workman as to whom he will employ will not justify their action.[31]

In the former case an ale brewers' association in the city of Rochester agreed with the local union that all employees of the breweries which belonged to the association should be members of the union, and that no employee should be retained more than four weeks who did not join. The Court, in a per curiam opinion, treats such agreement as contrary to public policy. This case seems to present substantially the same question that arose and was decided the other way in *Commonwealth* v. *Hunt, supra*—viz., the right to combine and agree not to work with non-union men.

In the English case, which was in the Court of Appeals, the employer and his workmen were all members of a society which had certain rules about the employment of apprentices. Upon a disputed question as to the construction of such rules, the society demanded that a certain apprentice should be discharged, and threatened to call out the men if that were not done. Thereupon, the apprentice was discharged, the em-

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[31] *Curran* v. *Galen,* 152 N. Y. 33 (1897); *Read* v. *Friendly Soc. of, etc., Stone Masons* (1902), 2 K. B. 732.

ployer thereby breaking a contract with him. In a suit by the discharged apprentice against the members of the union, it was held that the defendants were liable, and that the by-law, regarded as a contract between the employer and the union, was not a defence because of the means used—viz., threats and coercion. The conduct of the defendants is characterized in one of the opinions, in which a second judge concurred, as "taking the law into their own hands and compelling the opposing litigant by coercion to give effect to their view of a disputed obligation by breaking his contract with the plaintiff." A third opinion takes the ground that the construction put on the contract by the defendants was wrong.

These two cases suggest the remark that a contract between employer and workmen as to whom the former shall employ would certainly justify the latter in objecting to the employment of persons contrary to the terms of the contract, if the contract were not against public policy. The contract in the English case was not claimed to be against public policy. If the construction put on it by the defendants was right, it is difficult to see how they could be liable to the apprentice for insisting on the employers carrying it out and threatening to strike if that were not done. The case, therefore, could not properly be decided against the defendants without going into the merits of the question as to the proper construction of the contract, and the case can only stand, if at all, on the ground taken by the third judge.

In the class of cases last considered the workman, if he induced the employer at all, did so in the exercise of his right to choose his associates. Coming now to the cases outside of this class, to the matter of inducing generally, we note that the workman, in his attempt to bring the employer to terms, whether in regard to wages or the employment of non-union men or otherwise, instead of merely striking or threatening to strike, sometimes resorts to the weapon made familiar to us by the practice of the labor unions, known as the boycott; that is, he induces others not to deal with the employer, not to buy of him or sell to him or handle his goods or work for him. Is this lawful? It is interference with the employer's

business, and we assume, therefore, that it must be justified or it is not lawful. The defences made in the class of cases last considered do not apply here.

In *Allen* v. *Flood, supra,* Lord Herschell asked, arguendo, "Is competition the only permissible form of interference? Is a temperance crusade unlawful?" The question is very suggestive. A may persuade the customers of a liquor dealer to stop dealing with him because A considers the use of intoxicating liquors injurious or immoral, or may persuade the patrons of a Christian Science practitioner to desert her on the ground that Christian Science (so-called) is a delusion. In like manner, members of a community may induce persons not to buy of a certain dealer, B, because they think he does not deserve to be patronized; B may be an immoral man, or may not sell satisfactory goods, or his prices may be too high, or he may not treat his employees well, or he may be miserly or uncharitable. How is it to be determined whether inducing customers in such cases to withdraw or withhold their patronage is justified or not? Does it depend on whether the complaint made regarding B is well founded or not? If so, it would be necessary to try a variety of novel questions—*e.g.*, whether the use of intoxicating liquors is immoral, whether Christian Science is a good thing, whether B's prices are too high, or whether he treats his employees well or ill. Evidently such issues would not be deemed material; matters of that sort are matters of opinion, and the widest latitude must be allowed for difference of opinion and the free expression of it. So long as A acts in good faith and does not lie about B, A has a right, it would seem, to appeal to the public not to trade with B. It is held in Massachusetts that one who by his advice induces a woman to leave her husband is not liable to the husband for alienating the affections of the wife if the defendant acts in good faith.[32] To make a case it must appear that the advice was not given honestly but from malevolent motives. As said by Holmes, J., "A married woman must be supposed to be capable of receiving advice to separate from her husband,

[32] *Tasker* v. *Stanley,* 153 Mass. 148.

without losing her reason or responsibility." So the public must be considered capable of judging for itself regarding advice or appeals to it in matters of trade and business.

Returning to the relation of employer and workman, suppose an employer oppresses his workmen by harsh treatment or the payment of insufficient wages; may not the oppressed workman appeal to the public or to individuals not to favor the employer with their patronage or services? In many cases the law has stepped in and compelled employers to correct abuses in the treatment of workmen. It would be strange if, in like case, the workman would have no right to appeal to public or private opinion for such assistance as it might render by showing its displeasure in a practical way. If one may induce people not to deal with another on grounds of general public interest, as in the instances supposed in the last paragraph, *a fortiori* it may be done where the person inducing has an immediate personal interest, as in this case.

If the right then exists for the workman in a proper case to bring influences to bear on the employer through the channels of his business relations, how shall it be determined what is a proper case and what is not? We have supposed a case where the workman is plainly entitled to our sympathy. The case may be one where the workman is not entitled to our sympathy—*e.g.*, where the workman is well paid and demands extravagant wages; or there may be room for difference of opinion as to whether he is or not—*e.g.*, where his only complaint is that the employer employs non-union men. If we make the right depend on the character of the cause, evidently we have got to try questions of economics—*e.g.*, what in a given instance are fair wages, etc. This consideration leads to the conclusion that the right in question should not be restricted at all, or at least only by bad faith. To put it in another way, you cannot cut off the right to induce, the right to influence people's action, in trade and industrial matters, without cutting it off in a large class of cases where it would be unjust to do so; hence it should not be cut off at all. In fact, the right to combine, which is generally admitted, really involves the right to induce; and the right to give friendly advice and to free expression of

opinion, which, as we have seen, is reserved in the cases on the subject, really leaves no room for the operation of the alleged rule against inducing. Even the right to compete may be thought to involve the right to induce generally, since getting trade away from one is merely getting it for another, and what one may do for himself others may do on his behalf.

A workman has a right, therefore, in case of a controversy with his employer, to induce others in various relations to the employer to assist him, other workmen by refusing to enter or continue in the employ, customers and dealers by refusing to deal, etc.

It must be admitted, however, that there is more authority against this view than in favor of it, it being generally held that the boycott is illegal.[33]

In these cases sometimes the controversy arises simply from an attempt by the union to unionize a shop—*i.e.*, to require the employer to employ only union workmen.[34]

In other cases from something else—*e.g.*, in *Brace Bros.* v. *Evans*, it arose from the discharge of certain female operatives in a laundry, and the refusal of the employer, on request of the other workmen, to take them back. The defendants issued circulars giving their version of the difficulty and appealing to the public to withhold its patronage; representatives of the defendants also visited the defendants' customers and agents to persuade the former to stop patronizing and the latter to resign; other acts of a less defensible kind were done, such as denouncing agents who would not resign and calling on the public to boycott them; also picketing and carrying of banners and other dramatic public performances.

In *Hopkins* v. *Oxley Stave Co.*, *supra*, the workmen in a barrel factory objected to their company making machine-

[33] *Casey* v. *Cincinnati Typo. Union*, 45 Fed. Rep. 135 (1891); *Crump* v. *Commonwealth*, 84 Va. 927 (1888); *Brace Bros.* v. *Evans*, 35 Pitts. L. J. 399; 3 Ry. & Corp. L. J. 561; *Barr* v. *Essex Trades Council*, 53 N. J. Eq. 101; *Hopkins* v. *Oxley Stave Co.*, 83 Fed. Rep. 912 (1897); *Beck* v. *Teamsters' Protective Union*, 118 Mich. 497 (1898).

[34] *Casey* v. *Cinn. Typo. Union*, *supra*; *Crump* v. *Com.*; *Beck* v. *Teamsters' Pro. Union.*

hooped barrels, and appealed to the trade and the public not to buy them, and not to buy goods packed in them.

In *Baer* v. *Essex Trades Council, supra,* a newspaper was boycotted because it used plate matter, the defendants issuing circulars and other publications containing appeals and threats.

In *Beck* v. *Teamsters' Protective Union, supra,* a circular was issued appealing to all people who believed in living wages and fair treatment of employees to let the plaintiffs and their product alone.

The object sought by the workmen in most of these cases may not enlist our sympathy, but it is not apparent why they should be prevented from arguing their case before the public. In a case like *Bracc Bros.* v. *Evans,* where the dispute arose over the discharge of certain employees, it might easily happen that the public would be interested in knowing the facts, in order to form an opinion as to the treatment received by the employees. To grant the sweeping injunctions granted in these cases, or some of them, covering plain statements of fact (not alleged to be false) and appeals founded on such statements, seems to be a violation of the right of free speech, and such ground is taken by Caldwell, J., in a strong dissenting opinion in *Hopkins* v. *Oxley Stave Co., supra,* in which he reviews the history of the struggle in the English courts for free speech, commenting on the oppressive exercise of their powers by the English judges. He concludes with the proposition, which seems to us correct, that "whether organized labor has just grounds to declare a strike or boycott is not a judicial question. They are labor's only weapons, and they are lawful and legitimate weapons; and so long as in their use there is not force or threats of violence, or trespass upon person or property, their use cannot be restrained."

In the Massachusetts case of *Vegelahn* v. *Guntner,* 167 Mass. 92, in which an injunction was granted in a picketing case, and Field, C. J., and Holmes, J., dissented on the ground that the terms of the injunction were too broad in covering more than physical obstruction and threats of physical violence, Field, C. J., says, in the course of his dissenting

opinion, "I am not convinced that to persuade one man not to enter into the employment of another, by telling the truth to him about that other person and his business, is actionable at common law, whatever the motive may be. In the present case, if the establishment of a patrol is merely a peaceful mode of finding out the persons who intend to go to the plaintiff's premises to apply for work, and of informing them of the actual facts of the case in order to induce them not to enter into the plaintiff's employment, in the absence of any statute relating to the subject, I doubt if it is illegal and I see no ground for issuing an injunction against it." The dissenting opinions of Mr. Justice Holmes in this case and in *Plant* v. *Woods* assert the right of organized labor, in case of a contest with an employer, to use persuasion and any means not in themselves unlawful to induce persons not to deal with the employer. No extract from these opinions would do justice to them.

Lord Herschell says, in *Allen* v. *Flood*, "A man has a right to say what he pleases, to induce, to advise, to exhort, to command, provided he does not slander or deceive or commit any other of the wrongs known to the law of which speech may be the medium." [35]

People have a right to choose where they will bestow their favors, to prefer one to another in business and industrial as well as other matters. Having such right, is it not strange that one may not address another and discuss with him how he shall exercise that right, discuss the comparative merits of different dealers or employers, and say that one is worthy and another unworthy? It seems plain that, under the guise of protecting persons against interference in their business, the law is restricting the right of free speech and free discussion. The right of free speech implies the right to influence persons as to how they shall exercise their legal rights. If a person thinks that it is important for the welfare of the laboring man that all workmen should be organized into unions, and that all contracts between workmen and employers should be made by collective bargaining, he has a

[35] (1898) A. C. 138, per Herschell, L. J.

right to such opinion, however much others may differ from him; he has a right to propagate that view, and a right to induce all persons, consumers and workmen, to act on it by dealing only with union shops.

In the class of cases we have just been considering, A, having some fault to find with B, seeks to induce C not to deal with B. Now, going a step farther, if C is not persuaded to sever or avoid relations with B, A may seek to induce D and E not to deal with C. Is this lawful? C is not a party to the original controversy, and may therefore say that he should not suffer for B's fault, that he should not be made a victim of a controversy between others. This contention has some force, but, on the other hand, A may say that, in conducting a canvass against B, he may rightfully include B's associates and allies. B may be a slave-holder or a liquor dealer, or an unjust and tyrannical master; we will therefore appeal to the public not only to withhold their favors from him, but also from those having business relations with him, the more effectually to avoid giving any support to his business. The latter argument, it is submitted, should prevail, and the question be answered in the affirmative. The justification may not seem so strong and clear perhaps as in the former class of cases, and the right asserted may seem a little fainter, but it does not seem doubtful. Again we say that, when one person has a right to choose one of two courses, another has a right to address him, to argue the matter, and to request him to choose one course rather than the other. Any law which forbids this violates the rights of both persons. The law does not put a ban on the communication of ideas between responsible human beings. No one has such a claim on the custom, patronage, or services of another, in the absence of contract, that he can say to third persons, "You must not influence, or seek to influence, that other." In other words, the position that one is entitled to the benefit of his enterprise, skill, and credit, and therefore it is unlawful interference to induce others not to deal with him, has, when examined, no sound reason to support it, except, at least, as applied to cases of purely malicious interference.

The decided cases, however, are opposed to this view, as

in the class of cases last considered. In fact, the authorities make no distinction between the two classes. It is the boycott in general that is condemned. *Moore* v. *Bricklayers' Union*, a decision made by Judge Taft, in the Superior Court of Cincinnati,[36] is a good type of this class of cases. In that case a bricklayers' union, which was one of the defendants, required Parker Bros., who were contracting bricklayers, to pay the fine of a certain workman and also to discharge a certain apprentice and reinstate another, and, on their refusal to do so, declared a boycott of Parker Bros., and employed a member of the union, one McElroy, one of the defendants, to enforce it. A circular was issued requesting a withdrawal of patronage from Parker Bros., saying that they were discriminating against union labor and threatening to boycott any disobeying. The plaintiff, Moore, ignoring this, sold to Parker Bros., whereupon McElroy, by authority of the union, sent out a circular saying, "Members of the union will not use materials supplied by Moore," the effect of which was loss of customers by Moore. The argument of the defendants apparently treats the case as one of refusing to deal rather than inducing others not to deal, relying on the propositions that one may dispose of his labor as he pleases, may refuse to work for persons using the material of a certain dealer, may announce his intention to do so, many may combine to do these things, the members of the union had a right to refuse to work for any one using Moore's lime, and had a right to announce their intention to do so and to combine to do both. Taft, J., states this argument, and, in reply, says that it assumes two things, both of which he denies—viz., that motive is immaterial and combination legal. It is actionable, he continues, for dealers to combine not to sell to Parker Bros. simply to injure Parker Bros., and the same as to the customers of the plaintiff. The judge, however, finally rests his decision for the plaintiff on the ground that the defendants scared the plaintiff's customers away, and that there were no relations between the plaintiff and the defendant to justify it. In the course of the opinion it is said,

[36] 7 Ry. and Corp. L. J. 108 (1889).

"The immediate motive of the defendants here was to show to the building world what punishment and disaster necessarily followed defiance of their demands. The remoter motive of wishing to better their condition by the power so acquired will not, as we think we have shown, under the circumstances of the present case, make any legal justification for the defendants' acts."

In *Temperton* v. *Russell*,[37] which is similar to the last case, Esher, L. J., in the Court of Appeals says that the defendants were "not actuated by spite or malice towards the plaintiff personally in the sense that their motive was the desire to injure him, but they desired to injure him in his business in order to force him not to do what he had a perfect right to do."

Quinn v. *Leathem, supra,* is different from *Moore* v. *Bricklayers' Union* and *Temperton* v. *Russell* in that the plan to boycott C for refusing to deal with the obnoxious party B did not go farther than threats, as C, in that case, gave in and stopped buying of B. C therefore had no cause of action, but the action was brought by B. If it was lawful to boycott C, it was lawful to threaten to do so, and thus it appears that *Quinn* v. *Leathem,* and cases like it, may properly be considered as belonging to the same class as *Moore* v. *Bricklayers' Union.*

It is vaguely said in *Quinn* v. *Leathem* and other cases that, even if one has a right to induce third persons not to deal with another, he has no right to do so by threats. The answer is, It depends on what the threats are, on whether it would be lawful to do what is threatened; if it would be, then the threats are lawful, otherwise not.

The main line of argument in support of the action, in the inducing or boycott cases, is essentially the same as that used in all the preceding classes of cases which we have considered in this article. It is the same as that used in the cases where it was attempted to restrict the right to strike, and other mere refusals to deal, the same as that used in denying the right to threaten to strike, the burden of it being

[37] (1893) 1 Q. B. 715.

that the acts complained of are a conspiracy to injure and ruin the plaintiff by inducing customers or servants not to deal with or work for him and that this is done by threats and compulsion, which are likened to driving away customers by force.

This is rather the suggestion or coloring of an argument than the logic of one; not objectionable, but not sufficient in itself. It needs to be analyzed to test it. We have seen how misleading it is to talk of threats and compulsion. When the cook, taking the opportunity when her services cannot well be dispensed with, threatens to leave unless her pay is raised, it is a very effective threat and savors strongly of compulsion, but no one would say it is unlawful conduct on her part. When an employee makes himself so indispensable to his employer that the latter is ready to make him a partner rather than part with him, and the employee takes advantage of that situation to demand a partnership, you have threats and compulsion not unlike those used by labor unions which vote to fine employers and indulge in other fantastic performances, relying on the fact or hope that the services of the men are so necessary that the employer will yield. This is the kind of compulsion described by Hammond, J., in *Plant* v. *Wood, supra,* and of which he says that "restraint of the mind, provided it be such as would be likely to force a man against his will to grant the thing demanded, and actually has that effect, is sufficient," [38] and which is likened by some to presenting a pistol at a traveller's head and demanding his purse.

The argument fails to take note of what may be done lawfully by the use of strategy, especially by taking advantage of the power of combination, and so finds something illegal in the exercise of a certain power because it results in advantage to one side and disadvantage to the other. The fact that the argument is used and applies in cases where it is plainly unfounded, as in cases involving only a refusal to deal, as distinguished from inducing not to deal, goes far to discredit it. It proves too much. Furthermore, it is not

[38] 176 Mass. 502, per Hammond, J.

apparent what the limits of the doctrine asserted are. When is inducing, interference, justifiable, and when not? Competition is admitted to be one exception, and of course it is a large one. Are there others? The struggle to make an advantageous bargain is akin to competition. If I can keep other workmen away, I can bring the employer to terms, says the striking workman. Is it not permissible for him to do that, if possible without resorting to violence or fraud? Is this another exception? In trade competition there seems to be no limit to the strategy which may be used and which may result in ruining a competitor. The principal weapon which the workman uses is his right to bestow or withhold his labor where he will. It seems difficult to deny to one workman, or body of workmen, the right to apply to other workmen to assist them by the use of this weapon. This is the strategy of the industrial worker. That it is powerful arises simply from the demand for his services, and, as no one has a claim on his services, he cannot justly be prevented from taking advantage of that demand in any way which is open.

The views expressed by eminent authorities above cited, sustaining the right to induce, seem to be supported by the better reason, and we cannot think that the array of decided cases on the other side has settled the question finally.

In many opinions, in the various classes of cases considered in this article, there lurks the idea, sometimes openly stated, as by Taft, J., in *Moore* v. *Bricklayers' Union, supra,* and by Mr. Justice Harlan in *Arthur* v. *Oakes, supra,* that combination is an element which may furnish a cause of action not otherwise existing.

In *Barr* v. *Essex Trades Council, supra,* a somewhat novel view is suggested. It is said, referring to defendants' argument, "It loses sight of the combination, the whole strength of which lies in the fact that each individual has surrendered his own discretion and will to the direction of the accredited representatives of all the organizations. He no longer uses his own judgment but, by entering into the combination, agrees to be bound by its decree."

It is important, therefore, to inquire what the law is on

this point. We have already seen that the right of workmen to organize and act together in striking and other matters has been so fully recognized that it could hardly be questioned at the present day. In addition to this it has been laid down over and over again by those on both sides of the questions here discussed that what one may do, many may do, and may combine to do: that there can be no conspiracy to do a lawful act.[39]

As was said by Mr. Justice Brewer in *United States* v. *Kane, supra*, "It is well to come down to simple things, . . . that which is true in these simple matters, where there is a little piece of property and a single owner and a single laborer, is just as true where there is a large property, a large number of employees, and a corporation is the owner."

If there is any common law rule against a combination to do a lawful thing, it is not apparent what it is, and the authorities contain no clear statement about it. The half-expressed idea to that effect in the cases on the present subject seems to be merely a survival from the old tyrannical decisions which treated a strike as a criminal conspiracy to raise wages.

A final word on malice and motive. It has not seemed to us that it was necessary to determine generally the place of malice in the law of torts in order to answer the questions considered herein. But it may be useful to refer briefly to the subject.

The instances usually cited to show that malice—*i.e.*, express malice—may make a tort where one does not otherwise exist are malicious prosecution and the case of privileged communication in libel; to these may be added misrepresentation as akin thereto in requiring intention to deceive. These instances, at least the first two mentioned, are ex-

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[39] *Commonwealth* v. Hunt, 4 Met. 111, 130; *Carew* v. *Rutherford*, 106 Mass. 1, 14; *Vegelahn* v. *Guntner*, 167 Mass. 92, 107, 108, per Holmes, J.; *May* v. *Wood*, 172 Mass. 11, 13, and cases there cited; *Plant* v. *Woods*, 176 Mass. 492, 504, per Holmes, C. J.; *Bohn Mfg. Co.* v. *Hollis*, 54 Minn. 223; *Macauley* v. *Tierney*, 19 R. I. 255, 264; *Huttley* v. *Simmons* (1898), 1 Q. B. 181, 184, per Darling, J.; *Boyer* v. *Western Union*, 124 Fed. Rep. 246, per Rogers, J.

plained by those on the other side as instances where there is the grant of a conditional privilege: one may prosecute another if he does so in good faith; one may, under circumstances making a case of privilege, say what turns out to be false of another if it is done in good faith; but in either case the privilege is forfeited by bad faith. In answer to this position it is said that, nevertheless, it is the element of malice that, in the given circumstances, creates a cause of action. What then is the real significance of the instances put? They all relate to liability for false statements, and it has to be determined what degree of fault is necessary to create liability therefor. It may be held that the falsity of the statement is in itself sufficient, as in case of unprivileged libel; or, on the other hand, that there is no liability unless there is intentional misstatement or malice, as in deceit, or malicious prosecution, or privileged libel; or it may be held that negligence is sufficient; there is a present tendency towards adopting negligence as the standard in deceit and privileged libel. In all these instances the foundation of the liability is the falsity of the statement. The wrong is in making such a statement to the injury of the person to whom it is made or about whom it is made. They seem to afford, therefore, no foundation for generalizing as to malice, and it cannot be argued therefrom with any force that if one is actuated by malice in doing what ordinarily he has a right to do, his conduct becomes actionable.

Generally speaking, it seems true that the law makes an act legal or illegal without regard to the motive which prompts it. A man may do all sorts of things, which are perfectly legal, from an improper or malevolent motive. As is said by Mr. Stimson in his book on "Labor in its Relation to Law," p. 83: "An individual, by himself, as every melodrama tells us, may ruin another, may ruin him even with malice aforethought, without the laws interfering to prevent it in the least degree." Probably the reason of this is that the search into inner motives is too difficult and uncertain for the law generally to undertake, and it therefore seeks external standards. As said by Field, J., in *Vegelahn* v. *Guntner, supra* (p. 106), "When one man

orally advises another not to enter into a third person's employment, it would, I think, be a dangerous principle to leave his liability to be determined by a jury upon the question of his malice or want of malice, except in those cases where the words spoken were false." Moreover, it is important that legal rules shall be of general application. Motive tends to uncertainty, and would make the same act under the same circumstances legal in one person and illegal in another.

The cook in my kitchen may leave my service from spite and cause me great inconvenience, but she is not liable in damages for doing so. I cannot sue a man who sets up in business near me, and allege that he does it out of spite.

There are some instances, however, where the act done is so plainly characterless, except as an exhibition of spite and a desire to injure, that the law might not improperly forbid it, and legislation has sometimes done this, as witness the acts of legislature against spite-fences, so-called. If a land-owner builds a fence of such kind that it can be of no benefit to the premises, and is evidently put up merely to damage his neighbor's premises, it seems just that the general right of property should yield and the act be declared illegal. Now this principle might be extended indefinitely, and then we should have a system of law making motive a test of legality. A land-owner may just as well put up a tenement house or a factory to injure his neighbor, and do it more effectually in that way, as a fence. But probably such a case would not come within the statutes as usually framed. This legislation, therefore, seems to emphasize the fact that motive is usually immaterial. Conservative legislation would hesitate to extend the statute in question to the case of a factory or tenement house because the character of the building involves no suggestion of malice, as it does in case of a fence abnormally high, and it would be dangerous to leave it open to proof by other evidence that the motive was malice. Plainly the charge of malice would not be listened to in such a case independently of statute, and it seems safe to conclude that, generally speaking, malice does not give a cause of action, except by legislation and in the few instances of defamation,

etc., which have a special explanation. Least of all should the law, in cases of mixed motives, allow an issue as to which was the dominant motive. In the struggle between labor and capital, each striving for the advantage, as in the struggle between capital and capital, passions are engendered that doubtless lead the contestants at times to think more of injuring their opponents than of benefiting themselves, but the legality of their conduct must surely be tested by general considerations, arising from the relations of the parties, and like matters, and not by the quality of the motives in any particular instance. In a contest involving strikes and boycotts, one man, who is of low instincts, may act principally from motives of revenge; another, who is high-minded, from a desire to elevate himself and his fellow-workmen. Is the same act legal in one, and illegal in the other? Plainly not. They have a right to do it or not, and the motive of the individual is not material. Motive, in a general sense, may be material to this extent—viz., in determining whether the act shall be held to be legal, we inquire whether there may be a good reason for it, and, if there may be, we conclude that the law should permit it. This is, in effect, the mode of reasoning adopted by Chief Justice Shaw in *Commonwealth* v. *Hunt, supra.*

There may be a good reason why workmen should induce other workmen not to enter or remain in the employ of a certain employer, or induce customers not to deal with him, or why workmen should request the discharge of other workmen, or why generally persons should be induced to exercise their rights as to dealing with others in a certain way. Hence inducing generally should be permitted.

In *Allen* v. *Flood, supra,* Lord Chancellor Halsbury, although he dissented from the decision and held that the defendants should be held liable, evidently considered motive, except in the general sense, immaterial; for he said that the instructions to the jury were too favorable to the defendants in leaving to the jury the question of motive; that the defendants should be held liable even if they acted in good faith.[40] And, in the cases generally, when it is said that the

[40] (1898) A. C. 1, 83, per Halsbury, L. C.

defendants act from a desire to injure the plaintiffs and not from a desire to benefit themselves, there is no inquiry into actual motives, the statement refers rather to the tendency and effect of the acts. The question of actual motive or malice is thus really ignored as fully as by those who say that it is not material.

The conclusion seems to follow that the rights of the parties depend on other considerations than actual motive, and that the basis on which we have argued the matter leaves no further question open.

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